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Pricing Justice

THE WASTEFUL ENTERPRISE OF AMERICA'S BAIL SYSTEM

"Among the great untold stories of our time is this one: the last half of the twentieth century saw America's criminal justice system unravel."¹

INTRODUCTION

At any given time in America, approximately 70% of all inmates in state and local jails are pretrial detainees.² The large majority of these individuals are charged with nonviolent offenses and remain incarcerated after arrest—before even going to trial—simply because they cannot afford to pay the bail required for their release.³ Wealth-based practices like bail

¹ WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 1 (2011).

² MELISSA NEAL, JUSTICE POLICY INST., *BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL* 3 (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf> [<https://perma.cc/73UE-GUDP>].

³ While jails do house individuals charged with serious, violent crimes, approximately 75% of the population of both sentenced offenders and pretrial detainees are in jail for nonviolent traffic, property, drug, or public order offenses. DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, *PROFILE OF JAIL INMATES, 2002*, at 3 (2004), <http://www.bjs.gov/content/pub/pdf/pji02.pdf> [<https://perma.cc/ZL4B-KAK3>]. Five out of six defendants are jailed pretrial because they cannot afford assigned bail amounts. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, *PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1* (2007), <http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/L459-5L4B>]. In most cases, high bail amounts reflect a judgment that the defendant is dangerous—and therefore must be detained to prevent future crime. In others, high bail amounts may reflect the judge's concern over the defendant's lack of ties to the community. *See, e.g.,* Alysia Santo, *Kentucky's Protracted Struggle to Get Rid of Bail*, THE MARSHALL PROJECT (Nov. 12, 2015), <https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail#.wtRAv0r71> [<https://perma.cc/9BEV-EEJB>] (noting that judges in Kentucky often cite concerns of failure to appear at trial or danger to the community when setting bail for nonviolent defendants who have been rated low- or moderate-risk by pretrial assessment agencies, while another judge set a mere "\$10,000 bond on a murder case"). It is likely safe to assume that low bail amounts at the state level are typically imposed on nondangerous defendants, and the statistics for this low-bond defendant class are compelling. *See* Eric Holder, Att'y Gen., U.S. Dep't of Justice, Address at the National Symposium on Pretrial Justice (June 1, 2011), <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110601.html> [<https://perma.cc/Z6U7-LXES>] (observing that many pretrial detainees have been "charged with crimes ranging from petty theft to public drug use," and that they are detained "because they simply cannot afford to post the bail required—very often, just a few hundred dollars—to return

create a two-tiered system of justice in the United States, where regardless of factual guilt or innocence, a defendant's ability to assist attorneys in mounting a defense against accusations of criminal conduct and withstand prosecutorial pressures to enter a guilty plea is predominately dependent upon their financial standing.⁴ Meanwhile, the time spent in pretrial detention exacts not only a steep and long-term toll on an indigent defendant's productivity, family unity, and community well-being but also an enormous cost on American taxpayers.⁵ The policies governing criminal procedure should thus be amended to ensure that poor defendants are afforded the same freedom and mobility enjoyed by those with means, as opposed to our current system which predicates access to justice on the ability to pay an oft arbitrarily set bail amount.

home until their day in court arrives"); AM. BAR ASS'N, STATE POLICY IMPLEMENTATION PROJECT 2 (2011), http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.authcheckdam.pdf [<https://perma.cc/H472-M3UR>] [hereinafter ABA STUDY] ("Two thirds of the 500,000 individuals incarcerated in jail and awaiting trial are low bail risk . . . pos[ing] no significant risk to themselves or the community, as well as representing a low risk of flight."). A defendant's income affects both whether he ends up in jail and the length of his pretrial detention. See MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES 9, 22 (2007) (noting in an empirical study of New York City nonfelony defendants in 2003–2004 that "[e]very \$1,000 increase in bail amount was accompanied by an average increase of 2.3 days in pretrial detention time" and that "a lack of family and community ties, as well as lack of income, led to longer [pretrial] detention").

⁴ See, e.g., Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 15 (1989) ("Both in 1987 and in 1988 approximately 85 percent of all detainees were ultimately convicted of a criminal charge."); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2493 (2004) (noting that "[d]etained defendants find it harder to meet and strategize with their lawyers and to track down witnesses").

⁵ In New York City—where the average length of stay for a pretrial detainee is 176 days—it costs "approximately \$45,000 annually to house a single pretrial detainee." Rosa Goldensohn, *Average NYC Jail Stay Is 3 Times Longer than Reported, DOC Commish Says*, DNA INFO (July 22, 2015), <https://www.dnainfo.com/new-york/20150722/east-elmhurst/average-stay-at-rikers-is-3-times-longer-than-reported-doc-commish-says> [<https://perma.cc/CC3B-7XRA>]; ABA STUDY, *supra* note 3, at 5. Even when pretrial detention does not lead to a conviction, many detainees lose their jobs even if they are jailed for a short period of time; without income, the individual and his family may also fall behind on payments and lose housing, healthcare, transportation, and other necessities. See, e.g., ABA STUDY, *supra* note 3, at 5 (listing "job loss, inability to pay child support and eviction" as "collateral consequences" of pretrial confinement); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 424 (1990) ("The differences in the ability of the defendant [released pretrial] to work, maintain a family life, and prepare for the defense of criminal charges are substantial."). More broadly, the removal of productive workers from the labor pool negatively affects the economy. See Holder, *supra* note 3 (noting that nonviolent defendants "could be released . . . and allowed to pursue or maintain employment, and participate in educational opportunities and their normal family lives—without risk of endangering their fellow citizens or fleeing from justice").

Oddly enough, the fact that bail systems perpetuate injustice is not a newly discovered one.⁶ Rather, decades of research have firmly established the “basic contours”⁷ of the problem—when bail is set without regard to an individual’s ability to afford the amount required for release, only a small number of defendants can avoid jail time by paying it at arraignment.⁸ Nevertheless, lawmakers have by and large failed to introduce any meaningful reforms to the system.⁹

Every so often, however, tragedy will call attention to the inequities of cash bail and put pressure on lawmakers to act. The story of Sandra Bland,¹⁰ who died under mysterious circumstances in her Texas jail cell after failing to pay the \$500 necessary for her release, led to particular scrutiny of bail “since it clearly burdens the poor disproportionately, without

⁶ See, e.g., THOMAS HOBBES, *LEVIATHAN* 146 (1651) (observing that, “sometimes, as men’s manners are, justice cannot be had without money”); see generally Wayne L. Morse & Ronald H. Beattie, Editorial, *Survey of the Administration of Criminal Justice in Oregon*, 11 OR. L. REV. 173, 173–74 (1932) (demonstrating that a defendant’s status—whether out on bail or in jail—had a significant relationship to the case disposition, and those in jail received a substantially less favorable disposition); Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PENN. L. REV. 959 (1965) (noting that, despite the Supreme Court’s action in the areas of “search and seizure and indigents’ right to counsel,” the judiciary has yet to address the pervasive problem that money bail presents for the poor defendant in court); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964) (“Previous studies of bail have indicated that an accused who has been detained in jail between his arraignment and the final adjudication of his case is more likely to receive a criminal conviction or jail sentence than an accused who has been free on bail. Thus, a person’s inability or unwillingness to post bail may result in more than a temporary deprivation of his liberty.” (footnotes omitted)).

⁷ Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1346–47 (2014).

⁸ See MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., A DECADE OF BAIL RESEARCH IN NEW YORK CITY 110 (2012) (observing the low monetary amount of bail in “the small proportion of cases with a defendant who was able to post it at arraignment (10% of nonfelony cases and 7% of felony cases.)”).

⁹ See *infra* Section III.B (critiquing recently proposed alternatives to cash bail in the states).

¹⁰ Sandra Bland was pulled over in Waller County, Texas on July 10, 2015, for failing to signal a lane change. David Montgomery, *Sandra Bland Was Threatened with Taser, Police Video Shows*, N.Y. TIMES (July 21, 2015), <http://www.nytimes.com/2015/07/22/us/sandra-bland-was-combative-texas-arrest-report-says.html> [https://perma.cc/H267-K6JA]. A police dashboard-camera video of the encounter shows an escalating confrontation after Ms. Bland refused the officer’s request to extinguish her cigarette. *Id.* At one point, the officer threatened to forcibly remove Ms. Bland from her vehicle with a taser, saying, “I will light you up.” *Id.* Ms. Bland was then arrested on a charge of assaulting a public servant, and her bail was set at \$5000. Nathan Koppel & Ana Campoy, *Trooper in Sandra Bland Case Is Under Criminal Probe*, WALL ST. J. (July 22, 2015), <http://www.wsj.com/articles/trooper-in-sandra-bland-case-is-under-criminal-probe-1437589219> [https://perma.cc/6QEY-PRW8]. She was jailed while her family attempted to secure the 10% (\$500) necessary to pay a bail bondsman for her release. Clifford Ward, *Failure to Be Bonded Out Led Sandra Bland to Suicide, Jail Officials Allege*, CHI. TRIBUNE (Nov. 12, 2015), <http://www.chicagotribune.com/news/ct-sandra-bland-court-motions-met-20151112-story.html>. Three days later, Sandra Bland, age twenty-eight, was found hanged in her jail cell from a trash can liner. Koppel & Campoy, *supra*.

any greater assurance of public safety.”¹¹ Following the shocking suicide of Kalief Browder, the Bronx teen accused of stealing a backpack and held on bail for three years before his case was dismissed,¹² New Yorkers were forced to learn what the state’s indigent, minority, and immigrant residents¹³ have known for

¹¹ Koppel & Campoy, *supra* note 10; Margaret Talbot, *The Case Against Cash Bail*, NEW YORKER (Aug. 25, 2015), <http://www.newyorker.com/news/news-desk/the-case-against-cash-bail> [<https://perma.cc/TU6W-9782>].

¹² Kalief Browder was arrested in the Bronx in 2010, at age sixteen, for a crime he insisted he did not commit. He then spent over one thousand days on Rikers Island awaiting trial, because he could not afford the \$3000 bail necessary for his pretrial release. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law> [<https://perma.cc/7XV3-C82L>] [hereinafter Gonnerman, *Before the Law*]. During that time, Mr. Browder suffered through approximately two years in solitary confinement, where he tried to end his life on multiple occasions. Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/86ET-MSJ5>]. In his court case, there were more than ten adjournments due to the prosecution needing more time to build a case against him. Gonnerman, *Before the Law*, *supra*. It was not until three years into the case that a judge, after pressing the prosecutor and proactively seeking to resolve the case, learned that the prosecution had lost contact with its key witness. Gonnerman, *Before the Law*, *supra*. On May 30, 2013, after more than thirty court dates, Mr. Browder was released from Rikers Island without ever having been convicted of a crime. *Id.* Two years later, on June 6, 2015, Kalief Browder, twenty-two, died at his family home in the Bronx. Michael Schwartz & Michael Winerip, *Kalief Browder, Held at Riker’s Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html?_r=0 [<https://perma.cc/6TM5-DFVB>].

¹³ Under the relevant U.S. laws, a conviction for certain removable offenses will trigger mandatory detention and deportation or removal proceedings for noncitizens—including lawful permanent residents (green card holders). Individuals who are subjected to mandatory detention are not entitled to bond hearings and, as a result, languish in immigrant detention centers, jails, and prisons for prolonged periods of time while awaiting their deportation hearings. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343, 102 Stat. 4181, 4470 (1988) (codified as amended at 8 U.S.C. § 1252(a)(2) (2012)) (requiring detention of a specified class of noncitizens, depriving federal immigration officials of the authority to release those individuals on bond pending proceedings, and authorizing indefinite detention without a bond hearing). On November 30, 2016, the United States Supreme Court heard oral argument in *Jennings v. Rodriguez*. Kevin Johnson, *Argument Analysis: Immigrant Detention and the Constitution*, SCOTUSBLOG (Dec. 1, 2016, 11:28 AM), <http://www.scotusblog.com/2016/12/argument-analysis-immigrant-detention-and-the-constitution/> [<https://perma.cc/WRH6-F522>] [hereinafter Johnson, *Immigrant Detention and the Constitution*]. This class-action challenge to immigration detentions raises questions about whether immigrants, like virtually any U.S. citizen placed in criminal or civil detention, must be guaranteed a bond hearing. Kevin Johnson, *Argument Preview: The Constitutionality of Immigrant Detention*, SCOTUSBLOG (Nov. 23, 2016, 10:15 AM), <http://www.scotusblog.com/2016/11/argument-preview-the-constitutionality-of-immigrant-detention/> [<https://perma.cc/3FFB-CRRK>]. The U.S. Court of Appeals for the Ninth Circuit affirmed a district court injunction that generally requires bond hearings every six months for certain classes of immigrant detainees. *Id.* In October 2015, the Second Circuit Court of Appeals came to a similar conclusion, finding in *Lora v. Shanahan* that immigrants with criminal convictions have a right to a bond hearing. *Lora v. Shanahan*, 804 F.3d 601, 613–15 (2d Cir. 2015). The Supreme Court’s decision in the *Rodriguez* class action will dictate whether that practice applies to immigrant detainees nationwide. Johnson, *Argument Preview: The Constitutionality of Immigrant Detention*, *supra*.

years: the bail-bond enterprise defies logic and reason, and “perpetuates injustice in the name of the law.”¹⁴

Shortly thereafter, the New York State Senate introduced “Kalief’s Law” to make sure “cases go to trial within a reasonable timeframe,”¹⁵ and New York City Mayor Bill de Blasio announced a \$17.8 million initiative expanding the use of risk assessment tools that allow judges to keep certain defendants under “supervised release”—and thus out of jail—pending their day in court.¹⁶ “I wish, I deeply wish, we hadn’t lost him—but he did not die in vain,” de Blasio said.¹⁷ Under supervised release programs, a small percentage of approved defendants are released pretrial and must check in with assigned caseworkers in person and by phone.¹⁸ Similar pilot projects in Queens and Manhattan have shown promising results,¹⁹ but they have narrowly tailored

¹⁴ Robert F. Kennedy, U.S. Att’y Gen., Dep’t of Justice, Address to the Academy of Trial Lawyers of Allegheny County (June 1, 1964), <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/06-01-1964.pdf> [<https://perma.cc/AM45-FEFM>].

¹⁵ Daniel L. Squadron, *Senate Bill S5988A*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2015/s5988/amendment/original> [<https://perma.cc/ZQ77-G83V>]; see Kalief’s Law, S.B. 5988, 238th Cong., Reg. Sess. (N.Y. 2015). Kalief’s Law was introduced on June 16, 2015. *Id.* On June 1, 2016, the New York State Assembly voted to approve the bill by an overwhelming margin of 138–2. Stephen Johnson, *State Assembly Passes ‘Kalief’s Law’ to Reform Pretrial Detention*, N.Y. AMSTERDAM NEWS (June 9, 2016), <http://amsterdamnews.com/news/2016/jun/09/state-assembly-passes-kaliefs-law-reform-pretrial/> [<https://perma.cc/N7CN-7LVY>]. Senator Daniel Squadron, co-sponsor of the bill, attempted to force a Senate vote on the proposed legislation—by filing a motion which requires a bill be placed on a committee agenda within forty-five days of filing. Daniel L. Squadron, *Squadron Applauds Assembly Passing ‘Kalief’s Law’ to Fix NY’s Speedy Trial Law*, N.Y. STATE SENATE (June 2, 2016), <https://www.nysenate.gov/newsroom/articles/daniel-l-squadron/squadron-applauds-assembly-passing-kaliefs-law-fix-nys-speedy> [<https://perma.cc/WG9P-6D8L>]. The Senate Republicans refused to honor the motion, however, and Kalief’s Law died in the Senate Codes Committee in June 2016. *Id.* The legislation was once again passed by the State Assembly in a unanimous, bipartisan vote on February 14, 2017, and now awaits a vote by the Senate Majority. Daniel L. Squadron, *Squadron Applauds Unanimous Assembly ‘Kalief’s Law’ Passage to Fix Speedy Trial Law*, N.Y. STATE SENATE (Feb. 15, 2017), <https://www.nysenate.gov/newsroom/articles/daniel-l-squadron/squadron-applauds-unanimous-assembly-kaliefs-law-passage-fix> [<https://perma.cc/2VG6-6S6J>]; see also Kalief’s Law, Assemb. B. 3055-A, 2017–2018 Leg., Reg. Sess. (N.Y. 2017).

¹⁶ Andrew Keshner, *City Select Agencies to Supervise Released Offenders*, N.Y.L.J. ONLINE (Jan. 15, 2016), <http://www.newyorklawjournal.com/id=1202747163647/City-Selects-Agencies-to-Supervise-Released-Offenders?mcode=0&curindex=0&curpage=2>.

¹⁷ Jillian Jorgensen, *City Needs ‘Some Type of Bail Reform,’ de Blasio Says After Kalief Browder Suicide*, OBSERVER (June 8, 2015), <http://observer.com/2015/06/city-needs-some-type-of-bail-reform-de-blasio-says-after-kalief-browder-suicide/> [<https://perma.cc/ZTS4-297W>].

¹⁸ Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <http://nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/8MLK-YTMR>].

¹⁹ Since the Queens Supervised Release Program began operations in August 2009, through October 2012, there was a “total of 833 clients who exited the program,” over 87% of whom successfully satisfied supervision “requirements as of the date they exited the program.” FREDA F. SOLOMON, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., CJA’S QUEENS COUNTY SUPERVISED RELEASE PROGRAM: IMPACT ON COURT PROCESSING AND OUTCOMES 1–3 (2013), <https://www.pretrial.org/download/research/Queens%20County%20Supervised%20Release%20Program-%20Impact%20on%20Court%20Processing%20ad>

eligibility requirements based on the nature of the crimes charged, previous criminal history, the risk of failure-to-appear, and verified ties to the local community.²⁰ Kalief Browder, for example, would not have been eligible because the crime he was accused of—stealing a backpack—was charged as a violent felony.²¹ And even with the recent expansion of supervised release in New York City, still, only 8% of the 45,500 individuals held on bail each year will avoid pretrial incarceration.²²

This is why, in October 2015, New York State's then-Chief Judge, Jonathan Lippmann, announced a series of administrative reforms intended to reduce the number of indigent pretrial detainees.²³ The changes—which include an automatic review of all bail determinations, and, for felonies, require periodic judicial review of the prosecution's case and readiness for trial—came after Judge Lippmann's proposed bail statute

%20Outcomes%20-%20CJA%202013.pdf [https://perma.cc/DK6D-UN7N]; see Press Release, The City of N.Y. Office of the Mayor, Mayor de Blasio Announces Citywide Rollout of \$17.8 Million Bail Alternative Program (Apr. 8, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/336-16/mayor-de-blasio-citywide-rollout-17-8-million-bail-alternative-program> [https://perma.cc/A2Y8-8J9B].

²⁰ MARY T. PHILLIPS & RAYMOND P. CALIGIURE, N.Y.C. CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2013, at 42–45 (2014), http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=1410&doc_name=doc [https://perma.cc/B9FD-TWXR]; SOLOMON, *supra* note 19, at 1.

²¹ Mr. Browder was charged with robbery in the second degree, grand larceny, and assault. Dana Ford, *Man Jailed as Teen Without Conviction Commits Suicide*, CNN (June 15, 2015), <http://www.cnn.com/2015/06/07/us/kalief-browder-dead/>; Gonnerman, *Before the Law*, *supra* note 12. At the time, robbery in the second degree under New York state law qualified as a crime of violence. N.Y. PENAL LAW § 160.10 (McKinney 2016) (classifying second-degree robbery as a class C felony); N.Y. PENAL LAW § 70.02 (McKinney 2016) (defining class C felonies as violent crimes). The supervised release programs in New York City are an option for judges in cases prosecuted for select nonviolent felony charges. SOLOMON, *supra* note 19, at 1.

²² The current city-funded pilot programs that have operated in Queens and Manhattan since 2009 and 2013 (respectively) have the capacity to supervise 1100 pretrial defendants. Andrew Keshner, *City, DA Pledge \$17.8 Million to Expand Supervised Release*, N.Y.L.J. (July 9, 2015), <http://www.newyorklawjournal.com/id=1202731598195?germane=1202747163647>. With the citywide expansion of the programs, approximately 3400 individuals will be eligible for supervised release. Andrew Keshner, *City Selects Agencies to Supervise Released Offenders*, N.Y.L.J. (Jan. 15, 2016), <http://www.newyorklawjournal.com/id=1202747163647/City-Selects-Agencies-to-Supervise-Released-Offenders?mcode=0&curindex=0&curpage=2>. While only about 14% of individuals arraigned in New York City are held on bail each year, that amounts to about 45,500 individuals. Press Release, The City of N.Y. Office of the Mayor, Mayor de Blasio Announces \$17.8 Million to Reduce Unnecessary Jail Time for People Waiting for Trial (July 8, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/471-15/mayor-de-blasio-17-8-million-reduce-unnecessary-jail-time-people-waiting-trial> [https://perma.cc/33D2-9GWS]. Thus, with the expansion of supervised release, approximately 3400 of the 45,500 individuals held on bail each year will be released through the program. This works out to roughly 8%.

²³ Press Release, Hon. Lawrence K. Marks, N.Y. State Unified Court System, Chief Judge Jonathan Lippmann Announces Series of Reforms to Address Injustices of NY's Current Bail System (Oct. 1, 2015), https://www.nycourts.gov/press/PDFs/PR15_13.pdf [https://perma.cc/S92Y-AYLE].

failed to gain support in the state assembly for two years.²⁴ Absent legislative reform, such measures “might avert another tragedy like the death of Mr. Browder,” Judge Lippman said.²⁵

Neither administrative rulemaking nor the expansion of supervised release can solve the problems created by wealth-based systems in court, however. The legitimate purpose of ensuring the accused’s return for trial has been distorted into a systematic injustice—the policies that punish poor defendants while the wealthy walk free are not unique to New York.²⁶ Though most politicians today court voters “not by fighting crime but by talking about it,”²⁷ a handful of jurisdictions *have* attempted to reduce their reliance upon monetized conditions of release by adopting risk assessment tools to guide judges’ bail decisions.²⁸ Ultimately, however, these reforms, while well-intentioned, obfuscate the goal of individualized and equal justice in court. By grounding bail decisions in inflexible criteria—like socioeconomic background, neighborhood of residence, or education level—risk assessment tools exacerbate disparities in the United States’ criminal justice system.

This note argues that logic, constitutional infirmity, and public policy all weigh heavily against wealth-based pretrial systems. In light of these concerns, neither risk assessment tools nor supervised release programs offer a targeted solution to the

²⁴ *Id.*; see also Assemb. B. 6799, 2013–2014 Leg., Reg. Sess. (N.Y. 2013).

²⁵ James C. McKinley, Jr., *State’s Chief Judge, Citing ‘Injustice,’ Lays Out Plans to Alter Bail System*, N.Y. TIMES (Oct. 1, 2015), <http://www.nytimes.com/2015/10/02/nyregion/jonathan-lippman-bail-incarceration-new-york-state-chief-judge.html> [https://perma.cc/4QM5-LXM2].

²⁶ See NEAL, *supra* note 2, at 3. But See Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.’s Way*, WASH. POST (July 4, 2016), https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html [https://perma.cc/NF6K-E5MA].

²⁷ STUNTZ, *supra* note 1, at 188.

²⁸ As of early 2017, cities in Alabama, Kansas, Missouri, Mississippi, and Louisiana have amended their pretrial practices to end the use of secured money bail for new arrestees. *Ending the American Money Bail System*, EQUAL JUSTICE UNDER LAW, <http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/> [https://perma.cc/646B-UXWZ]. Arizona, Colorado, Indiana, Kentucky, Maryland, and New Jersey have introduced “evidence-based risk assessment” tools that encourage the release of arrestees without money bail or surety, except under certain circumstances. Ovetta Wiggins & Ann E. Marimow, *Maryland’s Highest Court Overhauls the State’s Cash-Based Bail System*, WASH. POST (Feb. 7, 2017), https://www.washingtonpost.com/local/md-politics/maryland-highest-court-overhauls-the-states-cash-based-bail-system/2017/02/07/36188114-ed78-11e6-9973-c5efb7ccfb0d_story.html [https://perma.cc/ZMF2-ZXQA]; Lorelei Laird, *Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor*, A.B.A. J. (Apr. 1, 2016), http://www.abajournal.com/magazine/article/courts_are_rethinking_bail [https://perma.cc/PN22-P5EW]; *Indiana High Court Orders Most Arrestees Released Without Bail*, WANE.COM (Sept. 7, 2016), <http://wane.com/2016/09/07/indiana-high-court-orders-most-arrestees-released-without-bail/> [https://perma.cc/99HN-XAW6].

problem posed by cash bail in court. Moreover, constitutionally grounded principles like federalism and the separation of powers require the legislature—not the judiciary—to actively seek to amend discriminatory policies governing bail-setting and pretrial release. And because Congress has long since done away with these issues at the federal level, the responsibility rests with state lawmakers alone, who ought to embrace policies that eliminate the role of finances, incarceration, and oversupervision in pretrial procedure. The deprivation of liberty should be the exception—not the rule—and detention should be allowed only in cases where a judge has made an individualized determination that no reasonable set of conditions can allay concerns of failure-to-appear or community safety.

Part I traces the evolution of bail and pretrial policy in the United States. Part II notes the serious disadvantages of the current bail system employed in New York City and the majority of jurisdictions nationwide. Part III documents the efforts already undertaken by certain state courts and legislatures to mitigate the harmful consequences of cash bail. It critiques these so-called alternatives to cash bail, focusing on both documented and theoretical shortcomings of pretrial supervised release programs. Part IV explores various avenues for achieving the oft-conflicting goals of crime prevention and pretrial liberty. It recommends an approach to penal policy and bail decision making that is based not only on heuristic methods of measuring cost and benefit but also the normative principles of good governance and jurisprudence that have historically justified society's use of detention.²⁹

I. THE HISTORY AND PURPOSE OF BAIL

At common law, bail was originally conceived as an emancipatory mechanism wherein judges were required to release the accused prior to appearing for trial, relying on their

²⁹ See NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 8 (Jeremy Travis et al. eds., 2014) ("The jurisprudence of punishment and theories of social policy have sought to limit public harm by appealing to long-standing principles of fairness and shared social membership. . . . [A]s policy makers and the public consider the implications of [the causes and consequences of growing incarceration rates in the United States,] . . . they also should consider the . . . principles whose application would constrain the use of incarceration: *Proportionality*: [c]riminal offenses should be sentenced in proportion to their seriousness[;] . . . *Citizenship*: [t]he conditions and consequences of imprisonment should not be so severe or lasting as to violate one's fundamental status as a member of society[;] *Social justice*: [p]risons should be instruments of justice, and as such their collective effect should be to promote and not undermine society's aspirations for a fair distribution of rights, resources, and opportunities.").

good word and that of their relatives, in addition to collateral, such as property or bond, to ensure defendants' return to court.³⁰ Throughout the Middle Ages, however, judges learned that the monetary amount of a bond could serve to detain a defendant indefinitely and began setting impossibly high bail as a means of pretrial punishment, thereby thwarting the purpose of the law on presumptive release.³¹ Similarly, the United States' system of bail and associated pretrial policies were designed solely to prevent the accused from fleeing the jurisdiction before being brought to trial.³² Increasingly, however, many judges deemed pretrial detainees a threat to public safety and set high bail to keep them in jail.³³ This practice, known as "preventive detention," represented a marked shift away from the basic premise of bail. Critics have repeatedly highlighted the problematic judicial discretion and insufficient constitutional protections for individual liberty³⁴ inherent in this predictive process and suggested better approaches to bail-setting and pretrial practice.³⁵ Notwithstanding such recommendations, pretrial detainees charged with nonviolent offenses, who pose no risk of flight, continue to comprise the majority of inmates in America's jails.³⁶

³⁰ TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 2, 6 (2010), <https://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf> [<https://perma.cc/JY6L-3AMH>].

³¹ *Id.* at 3.

³² William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 68–69 (1977) ("The function of bail is . . . limited to insuring the presence of a defendant before the court."); David J. McCarthy, Jr. & Jeanne J. Wahl, *The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change*, 53 GEO. L.J. 675, 715 (1965) ("[T]he purpose of bail is to ensure that the accused will appear in court . . . not to prevent the commission of crime."); Kennedy, *supra* note 14, at 1 (explaining that the "institution of bail [in the United States] originated in medieval England. Our Bill of Rights, in the Eighth Amendment, prohibits excessive bail; and the right to bail is guaranteed in the Judiciary Act of 1789.").

³³ The Federal Bail Reform Act of 1966 did not expressly permit judges to consider an individual's potential risk to community safety or future dangerousness in making the release decision. See EVIE LOTZE ET AL., PRETRIAL SERVS. RES. CTR., THE PRETRIAL SERVICES REFERENCE BOOK 11 (1999). However, by 1999, it was reported that "at least 44 states and the District of Columbia ha[d] statutes that list community safety as well as the risk of failure to appear as being appropriate considerations" to be weighed in the pretrial release decision. *Id.* at 12.

³⁴ See, e.g., Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1352 (2008) ("No one doubts that the government infringes liberty when it physically incarcerates individuals.").

³⁵ John V. Ryan, *The Last Days of Bail*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 542, 548 (1967) ("Although it has never been proven, there have been repeated suggestions that the bail setter often sets bail with the intention of keeping a defendant in jail to protect society or a certain individual. That this manipulation of the bail system takes place is practically unprovable, since the bail setter has such wide discretion." (footnote omitted)); see, e.g., Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 767–70 (2011).

³⁶ Holder, *supra* note 3.

These inmates are the unfortunate byproducts of the long-standing reliance on cash bail in the United States' courts;³⁷ individuals have always been required to post some form of collateral³⁸ to incentivize appearance at trial.³⁹ But the continued reliance on cash bail—a procedural relic held over from a time in our nation's history when the expanse of unsettled territory offered ample opportunity to flee, and the concept of mass incarceration was yet to be actualized—is unreasonable, imprudent, and unnecessary.⁴⁰

Notably, it was during an era of growth and development that the United States saw an increased role for commercial bail bond companies.⁴¹ It was reasonable and necessary, then, to require an individual or third party to post collateral to ensure appearance at trial.⁴² As America's uninhabited territories transformed into diverse urban areas, however, so too did the underlying purpose of bail evolve; today, it is less of a tool for keeping the accused out of jail pretrial, and more of a deadfall for the indigent.⁴³ Even the services of bail bondsmen are often out of reach for poor defendants; when bail is set at relatively small amounts, commercial bond companies cannot make enough of a profit to make it worth their while and will reject the would-be client's case.⁴⁴

³⁷ See, e.g., PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 10 (1967) (stating that "[t]he persistence of money bail can best be explained not by its stated purpose but by the belief of police, prosecutors, and courts that the best way to keep a defendant from committing more crimes before trial is to set bail so high that he cannot obtain his release"); Robert F. Kennedy, U.S. Att'y Gen., Dep't of Justice, Address to the Criminal Law Section of the American Bar Association 3 (Aug. 10, 1964), <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-10-1964.pdf> [<https://perma.cc/DYW7-4SXN>] (noting that bail poses a difficult problem to the poor who "must stay in jail because, bluntly, they cannot afford to pay for their freedom").

³⁸ Duker, *supra* note 32, at 41 (noting that in the early English criminal system, these requirements existed because imprisonment was "costly and troublesome" (quoting 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 584 (2d ed. 1968))).

³⁹ Duker, *supra* note 32, at 70 (citing *Consol. Expl. & Fin. Co. v. Musgrave* (1900) 1 Ch. 31 (Eng.)) (noting that the reliance on monetary sureties in the U.K.'s pretrial system was intended "to prevent the accused from disappearing"). Duker explains that "[t]his doctrine was readily absorbed into American jurisprudence." *Id.* at 71.

⁴⁰ SCHNACKE ET AL., *supra* note 30, at 6–8.

⁴¹ See Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), <http://www.nytimes.com/2008/01/29/us/29bail.html> [<https://perma.cc/FJE6-GLBL>] ("America's open frontier and entrepreneurial spirit injected an innovation into the [bail] process: by the early 1800s, private businesses were allowed to post bail in exchange for payments from the defendants and the promise that they would hunt down the defendants and return them if they failed to appear.").

⁴² SCHNACKE ET AL., *supra* note 30, at 4–7.

⁴³ Pinto, *supra* note 18.

⁴⁴ *Id.* Individuals who cannot raise the full bail amount have the option of using a commercial bail bondsman to secure their release, who can elect to secure the accused's pretrial release for a fee—"most often ten percent of the total bail amount."

A. *Wealth-Based Forms of Pretrial Release*

When making bail determinations, judicial officers must undertake the daunting task of predicting the likelihood that an accused person will commit another crime, hurt someone, or flee the jurisdiction before their next court date.⁴⁵ In some jurisdictions, judges set bail amounts according to the seriousness of the charges alone. Elsewhere, officials might weigh a variety of factors such as criminal record, employment status, and substance-abuse history. Notably, neither approach requires that bail be set in accordance with defendants' ability to actually afford the cash-bond, fine, or fee payment imposed; only at the federal level are judicial officers expressly forbidden from setting a financial condition that results in the pretrial detention of the person accused.⁴⁶

So long as state law allows bail to be set,⁴⁷ there are several ways an eligible defendant may obtain release after arrest. In addition to personal bond—"cash bail"—and commercial surety bond, or bail bondsmen, other options for release include: (1) deposit bond, or, requiring a defendant to pay "a percentage of the bail amount (usually 10 percent) with the understanding that fail[ure] to appear . . . will make them liable for the full bail amount"; and (2) property bond, which, "[i]n lieu of cash," requires an individual to "provide a deed . . . to allow the courts to" place a lien on their property "for the value of the bond amount."⁴⁸ Including nonmonetized means of release, judges in certain jurisdictions may have as many as nine options available for setting bail.⁴⁹

Despite the various means for assuring appearance in court, there remains a steadfast reliance upon those wealth-based

Tracy Velázquez et al., *Bailing on Justice: The Dysfunctional System of Using Money to Buy Pretrial Freedom*, PRISON LEGAL NEWS (Nov. 15, 2012), <https://www.prisonlegalnews.org/news/2012/nov/15/bailing-on-justice-the-dysfunctional-system-of-using-money-to-buy-pretrial-freedom> [https://perma.cc/MB7A-HC2F].

⁴⁵ See *infra* note 73.

⁴⁶ Federal law forbids the practice of setting bail in amounts that defendants are unable to afford: "The judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(B)(xiv)(2) (2012).

⁴⁷ In accordance with the various laws of the states and jurisdictions, judicial officers may be required to impose detention for certain enumerated offenses, or due to concerns for public safety; conversely, many states have laws regarding the imposition of the least restrictive conditions of release. NEAL, *supra* note 2, at 7, 24. About twenty-eight states allow a denial of bail "for charges other than capital offenses with rationales that vary greatly." *Id.* at 7. Roughly "21 states have laws disallowing the detainment of people for charges other than capital offenses, and at least two states—Alaska and Tennessee—do not allow courts to deny bail even for capital offenses." *Id.*

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at 7, 9.

conditions of release that present an insurmountable obstacle to freedom for poor defendants. As bail practices have developed state to state, the use of nonmonetized conditions of release have become “vanishingly rare,” and the accused can usually obtain pretrial release in just two ways: post the entire amount at arraignment “or pay a commercial bail bondsman to do so.”⁵⁰

The controversial role of the commercial bail bond industry in the United States’ criminal justice system has created a subtext to the ongoing debate about bail versus supervised release. In many jurisdictions, bail bondsmen have responded to the proposed growth of pretrial services programs by launching discrediting ad campaigns to convince citizens that commercial surety bonds are the safer, more taxpayer-friendly way to approach pretrial policy.⁵¹ The bail bonding industry has also aggressively sought influence over state legislators in the twentieth and twenty-first centuries—and with great success—by way of multimillion-dollar lobbying efforts, campaign donations, and an influential partnership between the American Bail Coalition (ABC)⁵² and the American Legislative Council (ALEC).⁵³ The two groups have worked together to outline model bills that ease supervision and regulation of bail bondsmen, increase the courts’ responsibility in pursuing forfeitures, and restrict the backing of pretrial services agencies while further narrowing the eligibility requirements for participation in such

⁵⁰ Pinto, *supra* note 18.

⁵¹ PHILLIPS, *supra* note 8, at 3–4; see JUSTICE POLICY INST., FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE 26–35, 37–39 (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/forbetterforprofit_executivesummaryfinal.pdf [<https://perma.cc/9QWT-DP5R>].

⁵² The American Bail Coalition was formed to ensure the long-term growth and sustainability of the surety bail industry in the United States. According to its website,

The American Bail Coalition is a trade association made up of national bail insurance companies who are responsible for underwriting criminal bail bonds throughout the United States of America. The Coalition also includes affiliate bail agent members from across the United States. The Coalition’s primary focus is to protect the constitutional right to bail by working with local and state policymakers to bring best practices to the system of release from custody pending trial.

About the American Bail Coalition, AM. BAIL COAL., <http://www.americanbailcoalition.org/about-us/> [<https://perma.cc/LFH3-TLGA>].

⁵³ The American Legislative Exchange Council is a nonprofit organization of conservative state legislators and private sector representatives that drafts and shares model state-level legislation for distribution among state governments in the United States. According to its website, ALEC “works to advance the fundamental principles of free-market enterprise, limited government, and federalism at the state level through a nonpartisan public-private partnership of America’s state legislators, members of the private sector and the general public.” AUDREY AMREIN-BEARSLEY, *RETHINKING VALUE-ADDED MODELS IN EDUCATION: CRITICAL PERSPECTIVES ON TESTS AND ASSESSMENT-BASED ACCOUNTABILITY* 73, n.3 (2014).

programs.⁵⁴ Disturbingly, since the formation of ABC and its alliance with ALEC, the for-profit bail industry has flourished, while rates of nonfinancial release have declined and bail amounts have steadily risen.⁵⁵

B. Alternatives to Money Bail

The most common forms of nonmonetized release in state court are (1) release on recognizance, where the defendant “signs a contract agreeing to appear in court for their hearing as required”; (2) unsecured bonds, where a defendant “signs a contract agreeing to appear in court . . . and accepting liability for a set amount” should he or she fail to appear as required; (3) conditional release, where an individual must honor certain enumerated stipulations in order to remain out of jail pending trial; and, (4) “[r]elease to pretrial services—[w]here available,” a defendant may be subject to “supervis[ion] by a pretrial services agency.”⁵⁶ Notably, these nonfinancial forms of release were only introduced in the last half-century after the frequency with which poor defendants were detained pretrial came under criticism.

Nationwide, judges, court administrators, and public officials banded together in a concerted effort to develop an approach to bail-setting that would eliminate the costly detention of indigent individuals who pose no flight risk or danger to the community. In New York City in 1961, the first step in this direction was taken with the launch of the Manhattan Bail Project.⁵⁷ Conceptualized by the Vera Institute of Justice, and in collaboration with the New York University School of Law, volunteers interviewed defendants before arraignment, gathering information about their connections to the community—relatives, occupations, and places of residence.⁵⁸ If the individual had sufficient community ties, they were endorsed for release on

⁵⁴ JUSTICE POLICY INST., *supra* note 51, at 32–33.

⁵⁵ A survey of felony cases in the seventy-five most populous counties in the United States showed that average bail amounts have increased by over \$30,000 between 1992 and 2006, posing a serious concern for indigent populations involved in the criminal justice system. Compare BRIAN A. REAVES & PHENY Z. SMITH, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1992, at 20 tbl.15 (1995), with THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 7 tbl.7 (2010).

⁵⁶ NEAL, *supra* note 2, at 7.

⁵⁷ MARION C. KATZIVE, NEW AREAS FOR BAIL REFORM: A REPORT ON THE MANHATTAN BAIL REEVALUATION PROJECT 2 (1968), <http://www.vera.org/sites/default/files/resources/downloads/1497.pdf> [<https://perma.cc/U5D3-MDL8>].

⁵⁸ *Id.*

recognizance to the court.⁵⁹ The Manhattan Bail Project demonstrated that released individuals with community ties would return to court, regardless of whether they had been required to post a bond.⁶⁰

The groundbreaking success of the Project led reformers nationwide to expect that pre-arraignment evaluations of defendants would offset the inherent inequities of cash bail. By 1964, public support for such programs “indicate[d] a rapidly growing consensus in favor of the proposition that pretrial release without bail can be accorded to large numbers of accused with significant benefits to the cause of justice and without handicapping law enforcement or impairing public safety.”⁶¹ In subsequent years, approximately one hundred jurisdictions in about half the states received public appropriations and private grants to reduce the unnecessary detention of defendants pretrial, while legislation encouraging pretrial release without bail was passed by Congress for the federal system, and by thirteen state legislatures.⁶² Nevertheless, wealth-based systems and pretrial detention stubbornly persisted, suggesting that any large-scale reform of the system requires more than the adoption of individualized pre-arraignment investigations.⁶³

In Washington, D.C., courts no longer use cash bail as a means of preventive detention, and the overwhelming majority of individuals released make all of their required appearances and avoid re-arrest pending trial.⁶⁴ Today, D.C.’s pretrial legislation “stipulates that [only] if no condition or combination of conditions will ‘reasonably assure’ that a defendant does not flee or pose a risk to public safety, ‘preventive detention’ can be ordered.”⁶⁵ Part of the success of D.C.’s pretrial system can be attributed to the broad discretion afforded to judges to determine

⁵⁹ *Id.*

⁶⁰ *Id.* Of the 3505 individuals released on Vera recommendations during the three years of the project, only 56—or 1.6%—failed to appear. Note, *Administration of Pretrial Release and Detention: A Proposal for Unification*, 83 YALE L.J. 153, 154 n.2 (1973).

⁶¹ U.S. DEPT OF JUSTICE, VERA FOUND., INC., PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, at xv (1965), <https://www.ncjrs.gov/pdffiles1/Photocopy/355NCJRS.pdf>.

⁶² See Bail Reform Act of 1984, Pub. L. No. 98-473, ch.1, § 202–210, 98 Stat. 1976, 1976–87 (1984) (codified at 18 U.S.C. §§ 3141–3151).

⁶³ KATZIVE, *supra* note 57, at 3.

⁶⁴ *The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth*, 2 CASE STUDS. 1, 1–2 (2009), <https://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf> [https://perma.cc/8ZJL-E99B].

⁶⁵ KIDEUK KIM & MEGAN DENVER, D.C. CRIME POLICY INST., A CASE STUDY ON THE PRACTICE OF PRETRIAL SERVICES AND RISK ASSESSMENT IN THREE CITIES 3 (2011), <http://docplayer.net/7545576-A-case-study-on-the-practice-of-pretrial-services-and-risk-assessment-in-three-cities.html>.

whether to deny bail outright—and impose preventive detention instead—based on concerns for public safety or the accused’s perceived danger to the community.⁶⁶ This sharply contrasts with the bail laws governing judges in “right to bail” states, where a judge cannot deny bail unless a person is charged with a capital crime.⁶⁷ In these states, intentionally setting bail in high amounts and hoping the accused cannot afford to pay it is the only way a judge can detain individuals believed to pose a danger to the community.⁶⁸

Just a small minority of jurisdictions have replaced monetized bail with risk assessment,⁶⁹ and only four states—Illinois, Kentucky, Oregon, and Wisconsin—have eliminated “commercial bail bonds, relying instead on systems that require deposits to courts instead of payments to private businesses, or that simply trust defendants to return for trial.”⁷⁰ Notably, even in the few states where commercial bail bonds are now outlawed, there remains a protracted struggle to get rid of finances in pretrial policy; without a doubt, then, eliminating the inequities of the bail system requires the complete removal of finances from the bail-setting equation.⁷¹

II. WHO PAYS?

Inapposite to their intended use, wealth-based pretrial practices have become the enabler of a costly and fragmented system of justice—one that disproportionately targets the

⁶⁶ See *id.* at 8.

⁶⁷ “Most state constitutions include a right-to-bail provision, commonly phrased, ‘All persons shall be bailable by sufficient sureties except for [certain offenses] when the proof of guilt is evident or the presumption great.’” Ariana Lindermayer, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 *FORDHAM L. REV.* 267, 267 (2009) (alteration in original). The constitutions of Alabama, California, Florida, Maine, Mississippi, Nevada, North Dakota, Oklahoma, Rhode Island, South Dakota, and Vermont allow either the legislature or the court to determine whether to allow bail in the excepted cases. *Id.* at 290–97. Courts in Arizona, Colorado, Pennsylvania, and the Virgin Islands have held that bail is precluded for certain cases if there is strong evidence against the defendant or a presumption. *Id.* at 298–300.

⁶⁸ See Ryan, *supra* note 35, at 544.

⁶⁹ See Wiggins & Marimow, *supra* note 28 (noting the handful of jurisdictions which have attempted to reduce their reliance on monetized conditions of release by adopting risk assessment tools to guide judges’ bail decisions).

⁷⁰ See Liptak, *supra* note 41.

⁷¹ See, e.g., Santo, *supra* note 3 (“For decades, Kentucky has been trying to find an alternative [to cash bail]. . . . In 1976, Kentucky made it illegal to profit from bail, effectively getting rid of commercial bondsmen. Instead, a statewide agency began trying to determine a defendant’s flight risk and chance of being arrested again using a tool called a risk assessment—a series of questions about a defendant’s history and sometimes other social factors. Some defendants were assigned risk scores, which judges could consider when setting bail. It was a radical approach at the time, yet jails continued to fill with defendants unable to afford bail.”).

indigent accused while simultaneously driving their families and communities deeper into debt and further along the margins of society. And while the monetization of liberty and fairness is implicitly offensive, the problem with the cash bail system involves more than illusory notions of justice or equity. Indeed, the needless arrest and incarceration of individuals charged with low-level offenses does not just wreak havoc on the personal lives and communities of the accused, it also comes at a significant cost to taxpayers.

A. *Taxpayers*

The ABA has explained that “the taxpayer implications of pretrial detention are significant given the expenses of operating detention facilities,” while noting that New York City spends nearly \$45,000 per pretrial detainee each year.⁷² Of course, some individuals are held without bail due to the nature of their crime(s) or flight risk;⁷³ however, taxpayer dollars and city budgets are largely devoted to detaining low-level offenders who pose no such risk.⁷⁴

According to the United States Department of Justice, housing pretrial detainees in state and local facilities costs taxpayers roughly \$9 billion annually.⁷⁵ In New York City, one report found that in 87% of cases where bail was fixed at \$1000 or less, defendants could not afford bail and were therefore jailed pending trial.⁷⁶ The same year, the New York City Department of Corrections spent a staggering \$42 million to incarcerate low-level defendants unable to afford bail.⁷⁷ Similarly, officials in Baltimore—a city with one of the largest jails in the country—recently proposed the construction of a \$181 million facility to

⁷² ABA STUDY, *supra* note 3, at 5.

⁷³ Once a person has been arrested, there is a presumption that they will be released pending the outcome of his or her case, unless the individual poses a danger to persons or property or seems likely to flee. *See* *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“The right to release before trial is conditioned upon the accused’s giving adequate assurance that he will stand trial and submit to sentence if found guilty.”). However, if an individual is deemed to pose a safety risk or flight risk, then pretrial detention is allowed. *See* *United States v. Salerno*, 481 U.S. 739, 751–55 (1987) (government’s interest in public safety can outweigh an individual’s liberty interest). While the Eighth Amendment prohibits *excessive* bail, the Constitution does not create an absolute right to bail. *Id.* at 754–55.

⁷⁴ Kennedy, *supra* note 14, at 3.

⁷⁵ Holder, *supra* note 3.

⁷⁶ JAMIE FELLNER, HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 2 (2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf [<https://perma.cc/9C4A-M5ZH>].

⁷⁷ *Id.* at 57.

house the city's burgeoning population of female pretrial detainees, the majority of whom are charged with misdemeanor or nonviolent offenses.⁷⁸ Although it is difficult to accurately assess the total cost nationwide, estimates suggest that incarcerating pretrial populations in state and county jails ranges anywhere from \$46 million⁷⁹ to \$124 million⁸⁰ annually.

To be sure, the price of incarcerating low-level pretrial detainees is astounding in and of itself. The human cost is far greater, however. No matter how brief, pretrial detention increases defendants' likelihood of conviction and probability of recidivism, while negatively impacting their long-term economic stability.

B. The Collateral Consequences for the Accused

The consequences of incarceration are clear for the criminally convicted: relationships are disrupted, families suffer, and invaluable opportunities for education and employment are lost. Rarely emphasized, however, is the fact that *innocent* individuals—people who have been found guilty of no crime—also suffer these harms and are forced to languish in jail, imprisoned because of their financial inability alone.

The stress of incarceration—or even just the threat of jail time—frequently prompts defendants to plead guilty and give up their right to trial. As one New York City judge told Human Rights Watch, it “is a self-fulfilling system; defendants have to plea, and end up with a record” which permanently labels them as criminal, which in turn further influences judges when setting bail in future cases.⁸¹ Virtually all individuals charged with low-level offenses who face an unaffordable bail amount end up accepting a plea, thereby absolving the state of

⁷⁸ NASTASSIA WALSH, JUSTICE POLICY INST., WHEN MORE IS LESS: HOW A LARGER WOMEN'S JAIL IN BALTIMORE WILL REDUCE PUBLIC SAFETY AND DIMINISH RESOURCES FOR POSITIVE SOCIAL INVESTMENTS 2 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/11-01_fac_when_more_is_less_md-ac.pdf [https://perma.cc/523G-JW4X].

⁷⁹ See TEX. CRIMINAL JUSTICE COAL., BEXAR COUNTY, TEXAS: ADULT CRIMINAL JUSTICE DATA SHEET 1 (2016), https://www.texascjc.org/system/files/publications/Adult%20Bexar%20County%20Data%20Sheet%202016_0.pdf [https://perma.cc/M3Y8-KC9R] (noting the average cost to Bexar County taxpayers to incarcerate the entire county jail pretrial population per day was \$100,536 in 2015).

⁸⁰ *UT Dallas Study to Help Curb Jail Costs, Cut Repeat Offenses*, UNIV. OF TEX. AT DALL. NEWS CTR. (Dec. 1, 2011), http://www.utdallas.edu/news/2011/12/1-14451_UT-Dallas-Study-to-Help-Curb-Jail-Costs-Cut-Repeat_article-wide.html [https://perma.cc/YE5Y-CKDQ] (explaining that Dallas County spends an estimated \$124 million annually alone on jail costs).

⁸¹ FELLNER, *supra* note 76, at 32 (quoting a Human Rights Watch Interview with New York City judge whose name was withheld (June 18, 2010)).

its burden to prove the case beyond a reasonable doubt; “guilty pleas account for [more than ninety-nine percent] of all convictions of New York City misdemeanor defendants.”⁸² Former New York City Commissioner of Correction Martin Horn succinctly described this dilemma: “Individuals who insist on their innocence and refuse to plead guilty get held But the people who choose to plead guilty get out faster.”⁸³ And while the plea might prevent detention altogether or at least allow a return to productivity outside the jail cell, it may also come with a criminal record.

In addition to the stress of incarceration itself, pretrial detention harms individuals in other ways. For example, there is a relationship between the amount of time spent behind bars and economic stability, especially for low-risk defendants.⁸⁴ Research indicates that, if not for the rise in rates of incarceration, the number of individuals living in poverty in the United States would decrease by as much as 20%.⁸⁵ Notably, the economy more than doubled in the years leading up to 2008, while the poverty rate remained fixed; at the same time, incarceration rates grew by more than 300%: “from 111 to 491 per 100,000” citizens.⁸⁶

Pretrial detention disrupts every aspect of the lives of those detained—it can cause individuals to lose their homes or spots in shelters,⁸⁷ while others are completely barred from receiving cash assistance or enrolling in the Supplemental Nutrition Assistance Program (SNAP).⁸⁸ Moreover, high rates

⁸² *Id.* at 3.

⁸³ PHILLIPS, *supra* note 8, at 3.

⁸⁴ CHRISTOPHER T. LOWENKAMP ET AL., THE ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 3–4 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf [<https://perma.cc/4UWX-TWNR>]; MARTIN SCHÖNTEICH, OPEN SOC’Y JUSTICE INITIATIVE PRESUMPTION OF GUILT: THE GLOBAL OVERUSE OF PRETRIAL DETENTION 3 (2014), <https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-09032014.pdf> [<https://perma.cc/STU6-G8QQ>].

⁸⁵ Robert H. DeFina & Lance Hannon, *The Impact of Mass Incarceration on Poverty*, 59 CRIME & DELINQUENCY 562, 581 (2013) (finding that the poverty rate in the United States would have fallen by 20% between 1980 and 2004 if not for mass incarceration and the criminal records that it generates).

⁸⁶ *Id.* at 563.

⁸⁷ See generally HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING (2004); LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY (2009).

⁸⁸ *Opting Out of the Federal Ban on Food Stamps and TANF*, LEGAL ACTION CTR., <http://www.lac.org/toolkits/TANF/TANF.htm> [<https://perma.cc/9RA9-7V55>]. Research shows that benefits such as SNAP effectively reduce poverty and support working families. See generally ARLOC SHERMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, VARIOUS SUPPORTS FOR LOW-INCOME FAMILIES REDUCE POVERTY AND HAVE LONG-TERM POSITIVE EFFECTS ON FAMILIES AND CHILDREN (2013), <http://www.cbpp.org/files/7-30-13pov.pdf> [<https://perma.cc/H3GB-FH6F>] (explaining that federal assistance programs like SNAP lift millions of Americans out of poverty, create better health outcomes for children born to poor

of incarceration are associated with depressed levels of civic and political engagement among formerly jailed individuals and their friends, family, and relations in the community.⁸⁹ Especially in the context of low-level pretrial detainees, the entrenched concept of permanent punishment in the United States presents a particularly problematic obstacle to one's pursuit of life, liberty, and happiness.⁹⁰ Even after release from jail, individuals' wages and long-term earning potential may be diminished by their criminal records, while the ability to meaningfully engage in democratic governance and political processes is significantly curtailed, if not completely denied. The fact that incarceration, unemployment, and reduced earnings make both the present and future more economically precarious—not just for the accused but also their families and communities—only exacerbates these problems.⁹¹

C. *The Collateral Victims*

A study of households with a family member in jail or prison found that approximately two-thirds struggle to meet their most essential needs, and nearly 50% are unable to purchase enough food or pay for housing.⁹² For one-third of families who were living above the poverty line before making contact with the criminal justice system, the expenses associated with incarceration or jail-time—such as phone, commissary, and travel costs—pushed them into debt.⁹³ Moreover, some state courts charge defendants who use public defenders, with fees sometimes rising into the thousands of dollars, while others might charge additional amounts for jury trials.⁹⁴ Among those surveyed, the average debt for court-related fines and fees alone was \$13,607—more than the \$11,770 poverty line for individuals.⁹⁵

parents, and eliminate the physiological stressors that impede children's ability to learn and succeed in school—outcomes that are associated with higher rates of employment and earnings when children reach adulthood).

⁸⁹ NAT'L RESEARCH COUNCIL, *supra* note 29, at 7.

⁹⁰ *See generally* THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

⁹¹ SANETA DEVUONO-POWELL ET AL., ELLA BAKER CTR. FOR HUMAN RIGHTS, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 9 (2015) (noting that “nearly 40% of all crimes are directly attributable to poverty and the vast majority (80%) of incarcerated individuals are low-income”).

⁹² *Id.* at 7, 9.

⁹³ *Id.* at 29–30.

⁹⁴ *Id.* at 13–14.

⁹⁵ *Id.* at 13, 25.

D. *The Case-Related Consequences*

Being jailed increases the likelihood that individuals will commit future crimes, substantially impacts defendants' ability to assist attorneys in mounting competent defenses, and encourages plea bargains—all of which increase the likelihood that the accused will be convicted, imprisoned, and subjected to an extended deprivation of liberty and justice as a sentenced inmate.⁹⁶

The pressure on pretrial detainees to plead guilty seems a particularly apt explanation for how detention leads to unfavorable case outcomes.⁹⁷ An individual who is facing a noncustodial sentence can be freed immediately after entering a guilty plea, whereas refusing to accept a plea deal may mean spending days, weeks, or months in jail.⁹⁸ The pressure to plead-out is undoubtedly a boon for prosecutors who “may be less willing to offer post-arraignment plea bargains,” instead opting to leverage “detention to encourage a guilty plea”—thereby profiting from a defendant's inability to make bail by way of a conviction of more severe charges.⁹⁹ Thus perpetuating the inexorable entanglement of poverty with imprisonment, harsh conviction charges “translate into more severe sentences,” and sentencing may be further affected because the defendant has not been allowed the chance to exhibit good conduct while on pretrial release in the community.¹⁰⁰

An exhaustive study of the impact of bail, in which a decade of criminal cases were analyzed, revealed that in New York City, 50% of bailed nonfelony defendants were convicted, compared with 92% of those jailed pending trial.¹⁰¹ Among those convicted, only 10% of the bailed defendants received prison sentences, compared with 84% of defendants who spent the entire pretrial period behind bars.¹⁰² Reflecting on this research, analysts at the New York City Criminal Justice Agency concluded that “[p]retrial detention had an adverse effect on every case outcome that was examined.”¹⁰³

There is also a proven connection between the length of pretrial detention and the likelihood to recidivate. As the defendant's standing in the community becomes less stable with

⁹⁶ PHILLIPS, *supra* note 8, at 115.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 117 fig.43.

¹⁰² *Id.* at 119 fig.44.

¹⁰³ *Id.* at 115.

each day of detention, it leads to an increase in risk for both failure to appear and future criminal activity. For low- and moderate-risk individuals,¹⁰⁴ detention lasting even a few days is strongly correlated with greater rates of criminal conduct both during the period leading up to trial and “years after case disposition”—“as length of pretrial detention increases up to 30 days, recidivism rates for low- and moderate-risk [individuals] also increases significantly.”¹⁰⁵ “When held 2-3 days,” low-level defendants are nearly 40% more likely to engage in criminal behavior pending trial than low-risk individuals detained for less than 24 hours.¹⁰⁶ Similarly, when held for more than a week, those same low-risk individuals are 51% more likely to engage in criminal misconduct in the 2 years following “completion of their cases,” compared to “equivalent [individuals] held no more than 24 hours.”¹⁰⁷

Charged with state and local crimes, the financially-able can afford to buy back their liberty and defend against criminal accusations from a position of freedom, while the poverty-stricken—unable to afford the price of justice—are forced to remain in jail while awaiting case disposition. Sure enough, studies demonstrate that those detained are less likely to have their charges reduced and more likely to be convicted and sentenced to jail time than their released counterparts.¹⁰⁸ The findings to support such phenomena suggest a “causal loop” through which liberty and equal justice can perpetually evade the poor defendant in court.¹⁰⁹

Arguably, poverty is the *sine qua non* of not only the exorbitant number of pretrial detainees currently flooding state and county jails but also the reprehensible mass incarceration that has become synonymous with criminal justice in the United States.¹¹⁰

¹⁰⁴ That is, individuals who have a low- to moderate-risk of failure to appear and no new criminal activity pending trial.

¹⁰⁵ LOWENKAMP ET AL., *supra* note 84, at 3.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ PHILLIPS, *supra* note 8, at 115.

¹⁰⁹ *Id.*

¹¹⁰ See *The Prison Crisis*, ACLU, <https://www.aclu.org/prison-crisis> [<https://perma.cc/UD9B-QYZY>] (“With only 5% of the world’s population, the U.S. has more than 20% of the world’s prison population—[making it] the world’s largest jailer. From 1978 to 2014, [its] prison population has risen 408%. One in 110 adults is incarcerated in a prison or local jail in the U.S.; [t]his marks the highest rate of imprisonment in American history.”).

III. RECOGNIZING THE PROBLEM FOR WHAT IT IS

Despite empirical data showing that bail is a poor predictor of a defendant's likelihood to appear, practices at the state level largely continue to rely on outdated pretrial policies that "discriminate[] against poor and middle-class defendants," do nothing for public safety, and usurp decisions that ought to be made by the judiciary.¹¹¹ Although the far-reaching consequences of inequitable systems like cash bail are relatively easy to identify, nowhere are they more pronounced than in minority and urban communities that are already hindered by significant social, economic, and public health crises.¹¹²

Even if defendants can afford the price of pretrial release with the help of a bail bondsman, there is a great risk of financial ruin when contracting with for-profit sureties. If the bailed individual does not appear at trial, the bondsman is responsible for finding and returning them to custody; if the bonding agency is unable to locate the individual, it becomes liable to the court for the whole amount; faced with the prospect of lost profits, bondsmen turn to the individuals who signed the bond, and "take whatever actions are necessary to recover their costs."¹¹³

Throughout the twentieth century, bail bonding was particularly scrutinized as it neither "guarantees security to society nor safeguards the right of the accused."¹¹⁴ In 1927, for

¹¹¹ STANDARDS FOR CRIMINAL JUSTICE PRETRIAL RELEASE 45 (AM. BAR ASS'N 3d ed. 2007).

¹¹² Precincts nationwide have embraced the "Broken Windows" approach to policing—which is based on a theory that links disorderly behavior to the potential for serious crime, and to urban decay in American cities. George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/?single_page=true [<https://perma.cc/8RQL-9J9Y>]. It encourages police presence in high-crime, low-income areas and the enforcement of quality-of-life laws (arguably victimless offenses such as petty vandalism and turnstile jumping) on the ground that if disorderly behaviors in public places are tightly controlled, then a significant drop in violent crime will follow. *Id.* In theory, Broken Windows hinges on "the gentle action of opinion and authority"; its authors believe "[i]t is rarely necessary to arrest an aggressive drunk, a rowdy gang member, or a graffiti artist." George L. Kelling & James Q. Wilson, *Decency*, ATLANTIC (Nov. 2007), <https://www.theatlantic.com/magazine/archive/2007/11/decency/306292/> [<https://perma.cc/6L3V-ZNEH>]. In practice, Broken Windows has proven to be incredibly ineffective at reducing violent crime, while arrests for "order-maintenance" offenses are disproportionately concentrated in poor and minority communities. Justin Peters, *Loose Cigarettes Today, Civil Unrest Tomorrow: The Racist, Classist Origins of Broken Windows Policing*, SLATE (Dec. 5, 2014), http://www.slate.com/articles/news_and_politics/crime/2014/12/edward_banfield_the_racist_classist_origins_of_broken_windows_policing.html [<https://perma.cc/3QAF-S63V>].

¹¹³ Velázquez et al., *supra* note 44.

¹¹⁴ WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 13 (1976) (quoting ARTHUR L. BEELEY, THE BAIL SYSTEM IN CHICAGO 160 (1927)); *see, e.g.*, STANDARDS FOR CRIMINAL JUSTICE PRETRIAL RELEASE, *supra* note 111, at 31 (noting that the bail system in 1968 was "unsatisfactory from either the public's or the defendant's point of view. Its very nature

example, Arthur L. Beeley published a thorough study of the pretrial system in Chicago, observing that indigent defendants remained in jail pretrial solely due to their inability to afford “even small bail amounts”; bail bondsmen had grown too powerful “in the administration of justice”; and “corruption and a failure to pay bond forfeitures plagued the industry.”¹¹⁵ Later, a 1954 survey of Philadelphia jails concluded:

One purpose for imposing a higher [bond] amount which would be consistent with the theory of bail would be that the increase in the defendant's financial stake reduces the likelihood of non-appearance at his trial. In practice, however, higher bail usually means that appearance in court is being obtained by holding the defendant behind bars.¹¹⁶

More than half a century later, the same issues remain at the heart of the for-profit bail bond enterprise. While in 1966 the system underwent significant reforms, and the federal government has since shifted away from pretrial policies that allow detention predicated upon financial inability alone, the “causal loop” of race, poverty, and incarceration continues to obstruct the administration of justice in state court, where cash bail systems and predatory bail bonding companies remain largely intact.¹¹⁷

Ultimately, bail-or-jail systems epitomize the notion of a two-tiered system of justice in the United States.¹¹⁸ The disparity between the purpose of bail in theory and the use and effect of bail in current practice—where discretionary policies and third party agents exploit low-income defendants and distort judicial decision making—seems to fly in the face of the constitutional safeguards to the equitable administration of

requires the practically impossible task of transmitting risk of flight into dollars and cents and even its basic premise—that risk of financial loss is necessary to prevent defendants from fleeing prosecution—is itself of doubtful validity. The requirement that virtually every defendant must post bail causes discrimination against defendants and imposes personal hardship on them, their families, and on the public which must bear the cost of their detention and frequently support their dependents on welfare.”)

¹¹⁵ JUSTICE POLICY INST., *supra* note 51 (citing BEELEY, *supra* note 114, at 40).

¹¹⁶ Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PENN. L. REV. 1031, 1033 (1954).

¹¹⁷ As discussed in greater detail in Section II.A, only four states have made illegal the use of commercial sureties, and only a handful of jurisdictions have attempted to increase the use of supervised release in place of detention.

¹¹⁸ The two-tiered system of justice in the United States has been defined as “the way in which political and financial elites now enjoy virtually full-scale legal immunity for even the most egregious lawbreaking, while ordinary Americans, especially the poor and racial and ethnic minorities, are subjected to exactly the opposite treatment: the world’s largest prison state and most merciless justice system.” Glenn Greenwald, *The Two-Tiered Justice System: An Illustration*, SALON (Apr. 14, 2011), http://www.salon.com/2011/04/14/justice_10/ [https://perma.cc/D79Z-UPQX].

justice, as well as those due process liberties afforded the accused which are so “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty.”¹¹⁹

A. *Bailing Out Equal Protection*

The rule that poverty and wealth have no place in deciding whether an individual should remain in jail relies on some of the most fundamental principles of American jurisprudence.¹²⁰ In general, the Equal Protection Clause of the Fourteenth Amendment prohibits “punishing a person for his poverty.”¹²¹ Accordingly, the Supreme Court has upheld the protection of certain rights of the indigent defendant throughout the critical stages of the American adversarial system. For example, the indigent accused is allowed an attorney during interrogation,¹²² they are provided an attorney during trial,¹²³ and guaranteed equal treatment in the appeals process.¹²⁴ Additionally, defendants cannot be imprisoned solely because of their inability to afford the price of freedom through the payment of a fine, where punishment is otherwise limited to payment of a fine for those able to afford it.¹²⁵

Surprisingly, though, courts had remained virtually silent in the face of mounting evidence of the discriminatory impact that wealth-based pretrial policies have upon the indigent accused.¹²⁶ Until 2015, the question of whether cash-

¹¹⁹ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations omitted) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

¹²⁰ See *Williams v. Illinois*, 399 U.S. 235, 241 (1970) (“[T]he Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons.”); *Douglas v. California*, 372 U.S. 353, 355 (1963) (condemning the “evil” of “discrimination against the indigent”); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”).

¹²¹ *Bearden v. Georgia*, 461 U.S. 660, 671 (1983).

¹²² *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹²³ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felonies); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanors).

¹²⁴ *Griffin*, 351 U.S.; *Douglas*, 372 U.S. at 355; *Lane v. Brown*, 372 U.S. 477 (1963); *Draper v. Washington*, 372 U.S. 487 (1963).

¹²⁵ *Tate v. Short*, 401 U.S. 395, 397–99 (1971); *Williams*, 399 U.S. at 240–41; *Smith v. Bennett*, 365 U.S. 708, 709 (1961).

¹²⁶ Foote, *supra* note 6, at 959. In *Stack v. Boyle*, 342 U.S. 1 (1951), the Court stated that the standard for determining cash bail is the amount “usually fixed for serious charges of crimes”; if any greater amount is required, “that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved.” *Id.* at 6. In a concurring opinion, Justice Jackson noted that if extraordinarily high bail is set solely to detain the accused pretrial, “it is contrary to the whole policy and philosophy of bail.” *Id.* at 10 (Jackson, J., concurring). He then added: “This is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount.” *Id.*

based pretrial systems deny poor defendants equal protection under the Fourteenth Amendment remained largely unanswered by the United States. The silence came to a historic and abrupt end in January 2015, when the United States Department of Justice filed a statement of interest¹²⁷ in the case of *Varden v. City of Clanton*.¹²⁸ In a watershed moment for the American criminal justice system, the United States announced its official position that “[i]ncarcerating individuals solely because of their inability to pay for their release . . . violates the Equal Protection Clause of the Fourteenth Amendment.”¹²⁹ In June 2015, the United States District Court for the Eastern District of Missouri followed suit, issuing an injunction in *Pierce v. City of Velda City*, thereby ending the defendant city’s use of a bail scheme that required arrestees to pay a secured cash bond¹³⁰ in a fixed dollar amount for each offense charged to gain pretrial release.¹³¹

The *Velda City* court’s landmark ruling that “[n]o person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond”¹³² extended the precept that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has”¹³³ to postarrest procedure and

The Court seems to imply in dictum that bail set at “average amount is reasonable,” and that an individualized analysis “is required only for amounts greater than the average.” Foote, *supra* note 6, at 995. “Yet the effect of *Stack v. Boyle* is to” allow judges to develop such scales as they deem appropriate, and evidence shows “that this is in fact what has been done.” *Id.*

¹²⁷ See Statement of Interest of the U.S. at 1, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Ala. Feb. 13, 2015). The United States has authority to file Statements of Interest pursuant to 28 U.S.C. § 517, which permits the attorney general “to attend to the interests of the United States” in any case pending in a federal court. 28 U.S.C. § 517 (2012). The United States can enforce the rights of the incarcerated pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997. 42 U.S.C. § 1997a (2012). The United States uses that statute to address unconstitutional conditions of confinement, many of which are caused by the overcrowding of prisons and jails.

¹²⁸ Statement of Interest of the U.S., *supra* note 127, at 1 (stating that the use of secured bail schedules to detain the indigent “not only violates the Fourteenth Amendment’s Equal Protection Clause, but also constitutes bad public policy”).

¹²⁹ *Id.*

¹³⁰ Secured cash bonds are cash or surety payments made in the full amount imposed by the court. See MICHAEL R. JONES, PRETRIAL JUSTICE INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 3 (2013), <http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf> [<https://perma.cc/AR98-XY7Q>].

¹³¹ Order at 1, *Pierce v. City of Velda City*, No. 4:15-cv-570-HEA (E.D. Mo. June 3, 2015), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/04/Velda-City-Final-Judgment-and-Injunction.pdf> [<https://perma.cc/VPJ5-X2BV>].

¹³² *Id.*

¹³³ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

pretrial imprisonment.¹³⁴ Shortly thereafter, a September 2015 ruling out of the United States District Court for the Middle District of Alabama, Northern Division, in the case of *Varden v. City of Clanton*, once again declared unconstitutional the use of money bail to detain poor defendants pretrial.¹³⁵ In November 2015, in *Thompson v. Moss Point, Mississippi*, the United States District Court for the Southern District of Mississippi, Southern Division held that the use of money bail violates the Equal Protection Clause.¹³⁶

Velda City and its progeny unequivocally declared that the role of finances in state and local criminal procedure is discriminatory, unjust, and unconstitutional. Such practices have no place in the United States, where the Supreme Court has made clear that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”¹³⁷ And while the *Velda City* line of cases provided much-needed media attention and a renewed legitimacy for the decades-old movement to rid American courts of the scourge of cash bail, the fight against wealth-based pretrial practices is far from finished.

B. *Piecemeal Reform in the States*

In 1962, Attorney General Robert F. Kennedy called upon practitioners, law students, and state bar associations to join in the movement for large-scale bail reform, noting that “[i]f justice is priced in the market place, individual liberty will be curtailed and respect for law diminished.”¹³⁸ At the time, federal courts regularly deployed cash bail schemes similar to the one abolished in *Pierce v. Velda City*: bail was determined based on a bail schedule, and judges often set bail amounts that many individuals “simply could not afford to pay.”¹³⁹

At present, however, federal law expressly prohibits that practice: “The judicial officer may not impose a financial

¹³⁴ See, e.g., Order, *supra* note 131, at 1; Order at 5, *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW (M.D. Ala. June 18, 2015) (ordering the defendant city to release the plaintiff under lawful nonfinancial conditions).

¹³⁵ Opinion at 7–8, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Ala. Sept. 14, 2015).

¹³⁶ Declaratory Judgment at 1, *Thompson v. Moss Point*, No. 1:15cv182LG-RHW (S.D. Miss. Nov. 6, 2015).

¹³⁷ *United States v. Salerno*, 481 U.S. 739, 755 (1987).

¹³⁸ Robert F. Kennedy, U.S. Att’y Gen., Dep’t of Justice, Address to the American Bar Association House of Delegates 7 (Aug. 6, 1962), <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-06-1962%20Pro.pdf> [<https://perma.cc/QN59-U3B7>].

¹³⁹ Statement of Interest of the U.S., *supra* note 127, at 4–5.

condition that results in the pretrial detention of the person.”¹⁴⁰ Introduced as part of the Bail Reform Act of 1966, the law requires that federal judges and magistrates consider a defendant’s ties to the community, employment, and prior record, and, “[i]n weighing these factors, judges are to consider 1) the extent to which pre-trial release will endanger the safety of those in the community, and 2) what is necessary to reasonably assure that the defendant will return to court when necessary.”¹⁴¹ But while the federal courts have long since operated under a system of presumptive release, few state legislatures have followed suit. At best, the federal bail reform legislation affects only a relatively small number of defendants.¹⁴² The much bigger, more persistent problem is that of bail in state and local court.¹⁴³

In recent years, however, dozens of cities and states throughout the country have begun to explore risk-based alternatives to bail. For example, New Mexico voters approved an amendment in November 2016 that prevents judges from jailing low-risk defendants who cannot make bail if they pose little threat to community safety and are likely to appear for court.¹⁴⁴ New Jersey’s Bail Reform and Speedy Trial Act, effective January 2017, “largely eliminate[s] bail for minor crimes” by using a risk assessment tool to help judges determine whether the accused will be released pretrial.¹⁴⁵ In February 2017, the Maryland Court of Appeals adopted a bail-setting procedure that

¹⁴⁰ 18 U.S.C. § 3142(c)(B)(xiv)(2) (2012).

¹⁴¹ Statement of Interest of the U.S., *supra* note 127, at 6 (citing 18 U.S.C. § 3142(b)–(d) (2012) and noting that such statutory provisions “outlin[e] factors the courts must consider in determining whether or not to hold a defendant over until trial, or release him or her on his or her own recognizance or pursuant to conditions” of release, *id.* at 6 n.17 (citing 18 U.S.C. § 3142(b)–(d))).

¹⁴² On the federal level, mass incarceration is not an issue; of the approximately 2.2 million defendants currently incarcerated in this country, fewer than 1 in 10 is being held in a federal facility. See DANIELLE KAEBLE ET AL., BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 17 app. tbl.1 (2015), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf> [<https://perma.cc/9PUE-MA9D>]. In addition, the federal court system relies upon a pretrial process that heavily favors pretrial release: a court “must resolve all doubts regarding the propriety of release in the defendant’s favor.” *United States v. Sanchez-Martinez*, No. 13–cr–00236–JLK, 2013 WL 3662871, at *5 (D. Colo. July 12, 2013) (quoting *United States v. Morales*, No 11-cr-20132-09-KHV-DJW, 2012 WL 603520, at *1 (D. Kan. Feb. 24, 2012)); *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991) (Pretrial release should be denied “only in rare circumstances.”).

¹⁴³ See KAEBLE ET AL., *supra* note 142, at 17 app. tbl.1 (showing the total amount of persons supervised by U.S. adult correctional systems as 6,814,600, with only 338,000 of those individuals in custody of the federal government.).

¹⁴⁴ An-Li Herring, *States and Cities Take Steps to Reform Dishonest Bail System*, NPR (Dec. 17, 2016), <http://www.npr.org/2016/12/17/505852280/states-and-cities-take-steps-to-reform-dishonest-bail-system> [<https://perma.cc/93SW-M8ND>].

¹⁴⁵ *Pretrial Justice*, MD. ALL. FOR JUSTICE REFORM, <http://www.ma4jr.org/pretrial-justice/> [<https://perma.cc/Y7EN-TSEP>].

is nearly identical to that of the federal system.¹⁴⁶ And in March 2017, the state attorney for Cook County, Illinois, implemented a policy where state attorneys actively support the release of pretrial detainees who are unable to afford bonds of \$1000 or less.¹⁴⁷

Closer to home, officials in New York City unveiled a plan to create a pretrial services system for defendants charged with low-level offenses.¹⁴⁸ Shortly thereafter, the Mayor's Office of Criminal Justice announced the development of an online bail payment system that can help reduce costly and unnecessary incarceration in New York City by making it easier for cash-strapped defendants to post bail and secure their pretrial release.¹⁴⁹ By making online bail payment available, defendants will no longer need to have someone present at their arraignments "who can pay the bail immediately [and] in cash."¹⁵⁰ Instead, defendants' friends and families can quickly pay online; easing the process for paying bail ensures that individuals do not spend unnecessary time behind bars and restores the presumption of innocence pretrial.¹⁵¹ Common-sense reforms like pretrial services and the online bail payment system represent significant—albeit long overdue—steps toward a fairer criminal justice system for all New Yorkers. Overhauling the current bail system—rather than eliminating cash bail in its entirety—has significant drawbacks, however, and the city's piecemeal remedies may be just as bad as the disease.

In pretrial programs, defendants are released and referred to an agency that imposes certain conditions on their release.¹⁵² Failure to comply with their conditions of release can lead to fines, incarceration, and other penalties.¹⁵³ The problem—as noted by Robin Steinberg and David Feige in their respective capacities as executive director of The Bronx

¹⁴⁶ *Judicial Rules*, MD. ALL. FOR JUSTICE REFORM, <http://www.ma4jr.org/judicial-rules/> [https://perma.cc/HE8E-EDK6].

¹⁴⁷ Emily Hoerner & Jeanne Kuang, *Cook County Prosecutor to Seek Release of Defendants Locked Up on Low Bonds*, INJUSTICE WATCH (Mar. 1, 2017), <https://www.injusticewatch.org/news/2017/cook-county-prosecutor-to-support-release-of-defendants-jailed-on-low-bonds/> [https://perma.cc/CQU7-CJ2F].

¹⁴⁸ See Keshner, *supra* note 22.

¹⁴⁹ Press Release, NYC Office of the Mayor, Mayor de Blasio Announces Online Bail Payment, Helping to Reduce Unnecessary Jail Time (Nov. 1, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/858-16/mayor-de-blasio-online-bail-payment-helping-reduce-unnecessary-jail-time> [https://perma.cc/TX3S-Z83P].

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See Keshner, *supra* note 22.

¹⁵³ Robin Steinberg & David Feige, *The Problem with NYC's Bail Reform*, THE MARSHALL PROJECT (July 9, 2015), <https://www.themarshallproject.org/2015/07/09/the-problem-with-nyc-s-bail-reform> [https://perma.cc/3LAT-2E9G].

Defenders and board chair of the Bronx Freedom Fund—is that these pretrial “services” are often indistinguishable from, and occasionally far more burdensome than, the sentence one might receive upon a finding of guilt.¹⁵⁴ Pretrial programs thus imitate the exact problem they seek to address: “inverting innocent until proven guilty, and placing punishment before adjudication.”¹⁵⁵

Steinberg and Feige further note, and data provided by the New York State Division of Criminal Justice Services confirm, that the large majority of arrests made by the New York City Police Department are for quality-of-life offenses.¹⁵⁶ These are the very same arrests—for arguably victimless crimes such as petty vandalism and turnstile jumping—that are disproportionately concentrated in poor communities of color.¹⁵⁷ Thus, the same people from these overpoliced and underserved communities will most often be eligible for participation in the new pretrial supervision scheme.¹⁵⁸ And while this might sound good in theory, it can be an overwhelming inconvenience for those participating in such programs, many of whom are “struggling to get by, working two jobs with inflexible hours while juggling childcare and other responsibilities. For them, the bureaucratic necessities of compliance can become terribly destabilizing.”¹⁵⁹

Before implementing a new pretrial regime that further entrenches governmental control over disadvantaged communities, lawmakers ought to consider whether these reforms are in fact desirable and upon whom their burdens will fall. So long as we continue to arrest and prosecute people for victimless quality-of-life crimes, “it will be important to ease the burdens . . . face[d] while awaiting trial.”¹⁶⁰ Thus, although proposed with the best of intentions, pretrial supervision programs threaten to undercut this objective. And it would be a shame if the sincere desire to assuage the unnecessary harm caused by our current approach to criminal justice led to the creation of “a new system larded with the same old flaws.”¹⁶¹

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* To add some additional perspective, in 2013 alone, the New York City Police Department arrested more than 350,000 people. *Adult Arrests by County: Beginning 1970*, N.Y. STATE, <https://data.ny.gov/Public-Safety/Adult-Arrests-by-County-Beginning-1970/rikd-mt35> [<https://perma.cc/JB9Q-RDRP>].

¹⁵⁷ See Peters, *supra* note 112.

¹⁵⁸ Steinberg & Feige, *supra* note 153.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

IV. THE SOLUTION

For policymakers and the body politic alike, the most salient feature of the broken criminal justice system lies in the intersection of poverty, race, and incarceration.¹⁶² In communities of concentrated social and economic hardship, state and local governments have launched an unprecedented intensification of police presence and criminal law enforcement.¹⁶³ Of course, no one can reasonably argue that cities should turn a blind eye to disorderly and disruptive public behavior. Increasingly,

¹⁶² According to the ABA, researchers estimate that anywhere from 60%–90% of criminal defendants need publicly-funded attorneys, depending on the jurisdiction. MAREA BEEMAN, AM. BAR ASS'N, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS 2 (2012), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_sustaining_and_improving_public_defense.authcheckdam.pdf [<https://perma.cc/56GF-AAVK>]; BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3 n.1 (2000), <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf> [<https://perma.cc/NM7H-SW2F>] (stating that 60%–90% of all cases involve indigent defendants and thus use court-appointed counsel); see also Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUSTICE (July 31, 2014) (noting that indigent individuals, “along with racial and ethnic minorities” are “disproportionately represented” among the jail and prison population); Harry J. Holzer et al., *The Economic Costs of Poverty in the United States: Subsequent Effects of Children Growing Up Poor* 1 (Nat'l Poverty Ctr., Working Paper No. 07-04, 2007) (exploring the “statistical relationships between children growing up in poverty and their earnings, propensity to commit crime, and quality of health later in life”); PHILLIPS, *supra* note 8, at 118, 128, 130 (stating, “Pretrial detention significantly increased the likelihood of a jail or prison sentence, in addition to raising the likelihood of being convicted in the first place” and that “[e]quity would require that the poor have the same chance for pretrial release (which is related to their chance of a positive case outcome) as the rich; that cannot happen as long as money bail is used to determine who is released and who is not” (emphasis omitted)). Across party lines, there is widespread recognition of the need for criminal justice reform in the United States. See, e.g., Donald Cohen, *An Unprecedented View of America's Criminal Justice System*, HUFF. POST (Jan. 21, 2016), http://www.huffingtonpost.com/donald-cohen/an-unprecedented-view-of_b_9039962.html [<https://perma.cc/9CS2-SJWB>]; Craig DeRoche, *The Time Is Now for Bipartisan Criminal Justice Reform*, FOX NEWS (Jan. 28, 2016), <http://www.foxnews.com/opinion/2016/01/28/time-is-now-for-bipartisan-criminal-justice-reform.html> [<https://perma.cc/LV2F-EWVG>]; Alice Miranda Ollstein, *Clinton and Sanders Call Out America's Racist Criminal Justice System*, THINK PROGRESS (Jan. 17, 2016), <http://thinkprogress.org/politics/2016/01/17/3740372/dem-debate-racism-criminal-justice/> [<https://perma.cc/9EJE-A4AD>]; Ben Geier, *Why Rand Paul's Debate Comments on Race, Prisons Make Him a GOP Outlier*, FORTUNE (Jan. 29, 2016), <http://fortune.com/2016/01/29/rand-paul-race-criminal-justice-republican-debate/> [<https://perma.cc/7HWP-WQ5W>].

¹⁶³ See Marie Gottschalk, *It's Not Just the Drug War*, JACOBIN (Mar. 5, 2015), <https://www.jacobinmag.com/2015/03/mass-incarceration-war-on-drugs/> [<https://perma.cc/2WPY-VFUF>] (In addition to the War on Drugs, other important factors contributing to the increase in the prison population were how, “beginning in the 1970s, police, prosecutors, judges, and parole boards read the political tea leaves and started to exert their enormous discretion in a more punitive way. In the 1980s and 1990s, legislators began piling on tougher sanctions across the board. These included not only stiffer punishments for drug offenses but also the proliferation of mandatory minimums, three-strikes laws, truth-in-sentencing legislation, draconian sex offender measures, mandatory sentencing guidelines, and life sentences.”).

however, these harsh responses to minor law-breaking come at far too great a cost.

Ultimately, laws dictating criminal procedure and punishment should not be determined solely by evaluating an individual's risk of flight or weighing indicia of public safety, nor should they be singly motivated by the want for retribution.¹⁶⁴ Similarly, successful bail-setting policies cannot be governed by analyses of cost and benefit alone.¹⁶⁵ Instead, the fair administration of justice requires a holistic approach—one that considers the liberty and equality implications of cash bail and pretrial detention while accounting for the safety and stability of those jailed, as well as that of the families and communities to which they will eventually return. Furthermore, because the legitimate authority of the state to deprive an individual of their natural right to liberty¹⁶⁶ is rooted in social contract theory,¹⁶⁷

¹⁶⁴ *Punishment—Theories of Punishment*, LEGAL ENCYCLOPEDIA, <http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html> [<https://perma.cc/XE5W-DKD9>] (“Theories of punishment can be divided into two general philosophies: utilitarian and retributive. The utilitarian theory of punishment seeks to . . . discourage, or ‘deter,’ future wrongdoing. The retributive theory seeks to punish offenders because they deserve to be punished. . . . Where the utilitarian theory looks forward by basing punishment on social benefits, the retributive theory looks backward at the transgression as the basis for punishment.”).

¹⁶⁵ See, e.g., John Roman, *Cost-Benefit Analyses of Criminal Justice Reforms*, NAT'L INST. JUS. J., Sept. 2013, at 30, 32, <https://www.ncjrs.gov/pdffiles1/nij/241929.pdf> [<https://perma.cc/5FCD-LP6A>] (acknowledging the basic economic principle of supply and demand; noting that “[t]here is no market for crime . . . [and] [n]o one chooses to be victimized”; and, focusing instead on cost-benefit in the areas of criminal law where there is a defined marketplace—measuring, *inter alia*, “whether changes in sentencing practices and the costs of more imprisonment are offset by crime reduction due to incapacitation and deterrence”).

¹⁶⁶ Natural rights are not contingent upon the laws, customs, or beliefs of any particular culture or government, and are thusly universal and inalienable. See generally *The Declaration of Independence and Natural Rights*, CONSTITUTIONAL RIGHTS FOUND., <http://www.crf-usa.org/foundations-of-our-constitution/natural-rights.html> [<https://perma.cc/8SRX-NGSJJ>]. Although the idea of natural rights has been asserted as justifying various ideologies, legal philosophers have consistently recognized the right to liberty as paramount. See, e.g., H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 175 (1955) (stating that “if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free”); T.H. GREEN, *LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION* 114 (Batoche Books 1999) (1895) (arguing that “if there are such things as rights at all, then, there must be a right to life and liberty, or, to put it more properly to free life”); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, ch. II, § 6 (1690) (emphasizing that “no-one ought to harm anyone else in his life, health, liberty, or possessions”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (Thomas Jefferson, wrote, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

¹⁶⁷ The social contract theory, first recognized by Thomas Hobbes in the fifteenth century, is grounded in the belief that humans instinctively operate out of self-interest, and so it is, therefore, both natural and rational to sacrifice some individual liberty in exchange for some common security by way of a mutual agreement with others. THOMAS HOBBES, *LEVIATHAN* 77–80 (Rod Hay ed., McMaster Univ. 1999) (1651). Hobbes argued that the natural state of the man unbound by government is war, and so the social contract

sound policies governing crime and punishment must not only be empirically grounded but also reflective of the normative principles that purportedly underpin the use of incarceration in the United States.¹⁶⁸

While there has been a renewed push for bail reform in the United States, a meaningful discussion of the principles underlying the practice of bail-setting and use of pretrial detention has been notably absent. As vindication and crime reduction are emphasized, the attitudes that once limited discretionary abuses of power and the excessive punishment have been forgotten and, as a result, bails are set even higher, and sentences are even more severe. Yet a pragmatic insight into the role of incarceration in an ordered society would recognize that the denial and deprivation of individual liberty and equal justice are the harshest penalties a civilization can impose.

CONCLUSION

The sheer surfeit of harms caused by cash bail ought to arouse the suspicion that something is seriously amiss with the states' approaches to criminal procedure. Studies spanning six decades have firmly established that the denial of liberty pretrial has plea-inducing and criminogenic effects;¹⁶⁹ that pretrial incarceration as a result of poverty alone "so pervades our system that for a majority of defendants accused of anything more serious than petty crimes, the bail system operates" as an outright denial of liberty;¹⁷⁰ and, that "there is an extraordinary correlation between pretrial status (jail or bail) and the severity of the

requires that individuals forego certain liberties in exchange for the common security provided by an absolute ruler. THOMAS HOBBS, *PHILOSOPHICAL RUDIMENTS CONCERNING GOVERNMENT AND SOCIETY* 16–28 (London, John Bohn 1845) (1649); HOBBS, *supra*, at 77–80. Generally speaking, John Locke's contemporary iteration of the social contract proposes a more democratic approach to ordered society and takes a position on mankind not quite so grim as that of Hobbes. Locke argued that, by acquiescing to the social contract, individuals impliedly consent to the creation of a political system of governance through which they gain the protection of laws, judges to adjudicate those laws, and the executive power necessary for their enforcement. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 174–75 (Lawbook Exchange, Ltd. 2006) (1689).

¹⁶⁸ NAT'L RESEARCH COUNCIL, *supra* note 29, at 8 n.1 ("Political theorists and legal analysts have often observed that public policy necessarily embodies ethical judgments about means or ends. These judgments are informed by normative principles: basic ideals or values—often embedded in history, institutions, and public understanding—that offer a yardstick by which good governance is measured."); EVALUATION IN PLANNING: FACING THE CHALLENGE OF COMPLEXITY 231 (Nathaniel Lichfield et al. eds., 1998) (noting that "policy evaluation is a normative pursuit where ends and means are intertwined. The idea of generating objective 'best' alternatives by applying logical reasoning to valid premises and clear, quantifiable objects is a fallacy.").

¹⁶⁹ Foote, *supra* note 6, at 959–60.

¹⁷⁰ *Id.* at 960.

sentence after conviction.”¹⁷¹ Apart from their numerosity, the more fundamental flaw in the states’ varied bail-setting methods is that they have nothing to do with the traditions and texts through which this nation first declared its independence from absolutism and sought to “establish Justice” and “secure the Blessings of Liberty.”¹⁷²

Combined with the unprecedented increase in arrests and incarceration seen in the last half century,¹⁷³ the shift in pretrial policy and bail-setting has imposed a range of unwanted social and financial costs, and the resultant degree of crime-preventing benefits remains largely unknown. Those high-sounding platitudes of democratic governance, claiming liberty for all and that justice is blind, ring incredibly hollow upon the realization that the very laws from which we seek protection are those which have institutionalized the inequity of cash bail and allowed the predatory bail bondsman’s discretion to replace that of the prudent magistrate. What is most confounding is why—or how—we, as political beings, have lost sight of this blatant and catastrophic discrimination, seen so early in American history and highlighted time and again throughout the last century. Reflecting on the anomalies he observed in America in 1835, Alexis de Tocqueville wrote:

[N]o man can entirely shake off the influence of the past; and the settlers, unintentionally or involuntarily, mingled habits and notions derived from their education and from the traditions of their country with those habits and notions which were exclusively their own. . . .

I shall quote a single example to illustrate what I advance.

The civil and criminal procedure of the Americans has only two means of action,—committal or bail. The first measure taken by the magistrate is to exact security from the defendant, or, in case of refusal, to incarcerate him: the ground of the accusation and the importance of the charges against him are then discussed.

It is evident that a legislation of this kind is hostile to the poor man, and favorable only to the rich. The poor man has not always a security to produce, even in a civil cause; and if he is obliged to wait for justice in prison, he is speedily reduced to distress. The wealthy

¹⁷¹ *Id.*

¹⁷² U.S. CONST. pmbl.

¹⁷³ See generally William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV 1969 (2008) (arguing that states responded to the Warren Court’s defendants’ rights revolution with laws that toughened sentencing and defined crime more broadly, leading to more jail time and more arrests, which disproportionately affected poor and minority communities. Adding to the focus on the poor, Stuntz notes, was prosecutors’ decision to use their discretion to negotiate guilty pleas with public defenders—prosecutors could sift through the broader array of criminal charges and sentences passed by legislators to make deals, taking many easy guilty pleas from poor defendants.).

individual, on the contrary, always escapes imprisonment in civil causes So that all the penalties of the law are, for him, reducible to fines. Nothing can be more aristocratic than this system of legislation. Yet in America it is the poor who make the law, and they usually reserve the greatest social advantages to themselves. The explanation of the phenomenon is to be found in England; the laws of which I speak are English, and the Americans have retained them, however repugnant they may be to the tenor of their legislation and the mass of their ideas.¹⁷⁴

The failure of our justice system to preserve the liberty of the accused lies in an unrelenting reliance on—and blindness to—policies which disregard normative principles of fairness and just deserts, focus only on analytical elements of imprisonment and cost-benefit analyses, and are tailored to the needs of a society whose values are vastly different from our own. The solution lies in recognition of this fact, and the responsibility rests, as it should, on the American legal community.

Speaking to the Criminal Law Section of the American Bar Association in 1964, Attorney General Robert F. Kennedy said:

No generation of lawyers has yet failed its responsibility to the law or to our society. The role of the lawyer in De Tocqueville's time prompted him to say that "I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people."

Let us today continue to accept that challenge, whether in private practice or public service. Let us see to it that for all our citizens, criminal law means criminal justice.¹⁷⁵

More than fifty years later, Kennedy's words ring truer than ever, and the need for meaningful criminal justice reform remains. When incarceration has become so grossly overused even though less severe alternatives might achieve better individual and social outcomes, it is due time to rethink the way poor defendants are treated in our communities and in our courts. A system that makes less use of detention will better achieve crime prevention and encourage equality and civic engagement than a harsher, more punitive system that deprives individuals of meaningful citizenship, opportunities for growth, and personal freedom.

¹⁷⁴ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 40–41 (Henry Reeve trans., 3d ed. 1839) (footnotes omitted).

¹⁷⁵ Kennedy, *supra* note 37, at 7; *see also* Eric Holder, Att'y Gen., U.S. Dep't of Justice, Speech at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th Criminal Justice Network Conference (Aug. 1, 2014), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th> [<https://perma.cc/F9EE-8VHH>] (quoting Kennedy, *supra*).

So the problem is not new. What is new, however, is the spirit in which we approach it now. We live in a time of growing concern all over the country that the scales of our legal system measure justice, not wealth. And it has been my hope that we could bring new energies to this momentum and find solutions to the problem.¹⁷⁶

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¹⁷⁶ Kennedy, *supra* note 37, at 2–3.

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